In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Adversary Proceeding
CYNTHIA RENA WEBB	)	
(Chapter 7 Case 94-40802)	)	Number 94-4077
	)	
Debtor	)	
	)	
	)	
	)	
CYNTHIA RENA WEBB	)	
	)	
Plaintiff	)	
	)	
	)	
	)	
v.	)	
	)	
LAW STUDENT LOAN/EDUSERV.	)	
and	)	
HEMAR INSURANCE	)	
CORPORATION OF AMERICA,	)	
a South Dakota Corporation	)	
	)	
Defendants	)	

MEMORANDUM AND ORDER ON MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

Debtor, Cynthia Rena Webb, initiated this proceeding on June 21, 1994, seeking a determination that certain debts were dischargeable in her Chapter 7 case under section 523(a)(8)(B) of the Bankruptcy Code. On July 26, 1994, Hemar Insurance Corporation of America, a South Dakota corporation ("HICA"), filed an Answer and a Motion to be joined as an additional defendant in this proceeding. By Order entered August 23, 1994, HICA was added as a party defendant in this proceeding. On October 20, 1994, HICA filed a Motion for Summary Judgment, and on November 29, 1994, Debtor filed a Cross-Motion for Summary Judgment. Based upon the parties' briefs, the record in the file, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The essential facts of this proceeding are undisputed for the purposes of these motions.[1] Debtor attended George Washington University Law School in Washington,

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[1] Rule 56.1 of the Local Rules for the Southern District of Georgia is entitled "Motions for Summary Judgment," and it provides:

> Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, in addition to the brief, there shall be annexed to the motion a separate, short, and concise statement of the material facts as to which it is contended there exists no genuine issue to be tried as well as any conclusions of law thereof. All material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by a statement served by the opposing party. Response to a motion for summary judgment shall be made within twenty (20) days of service of the motion . . .

Local Rule 56.1 of the United States District Court, Southern District of Georgia, made applicable to proceedings before this court by Bankruptcy Local Rule 401. Thus, a statement of material facts as to which the moving party contends there exists no genuine issue to be tried is required to be attached to any motion for summary judgment, and all material facts set forth in the statement are deemed admitted unless controverted by the opposing party in a timely response. HICA filed such a statement with it motion, but Debtor has not filed any response controverting the statement and did not file a statement of material facts with her Motion. Accordingly, the facts set forth in HICA's statement will be taken as true for the purposes of these motions.

D.C. She received her law degree in June of 1992, and is licensed to practice law before the United States District of Columbia Court of Appeals and the United States Tax Court. During the course of her enrollment at George Washington, Debtor received two loans from Norwest Bank of South Dakota ("Norwest"). She received the first loan of $5,000.00 in August of 1990 and the second of $2,900.00 in March of 1991. Debtor executed, in connection with these loans, two promissory notes in favor of Norwest, both providing for the accrual of interest at a variable rate, currently 8.125%. The notes further provide that, in the event Debtor defaults on her obligations thereunder, she is responsible for all attorney's fees and costs incurred in their enforcement.

Debtor obtained these loans through a program known as the "LAWLOANS Program." The Program is designed to allow a law student to apply to a number of different lending institutions through a single application form. The LAWLOANS Program was created on July 31, 1989, as evidenced by a multi-party agreement signed by the following parties:

> 1) The Higher Education Assistance Foundation, a non-profit corporation organized under the laws of the State of Minnesota;
>
> 2) Student Loan Marketing Association, a corporation organized under the laws of the United States of America, *i.e.*, Sallie Mae;
>
> 3) Hemar Service Corporation of America, a corporation organized under the laws of the

State of Minnesota;

4) Hemar Insurance Corporation of America, an insurance corporation organized under the laws of the State of South Dakota; and

5) Norwest Bank of South Dakota, N.A., a national banking association.

Each of these parties played an integral role in the Program. The Higher Education Assistance Foundation ("HEAF") initiated the loan process for all loans made under the program by receiving and reviewing the applications, and entering data off the applications. Norwest originated the loans, Hemar Service Corporation of America ("HSCA") serviced them, and HEAF and HICA insured Norwest against the default, disability, or bankruptcy of the student borrowers. HEAF guaranteed some types of educational loans made under the program, while HICA insured others. Both HEAF and HICA have paid claims to Norwest and Sallie Mae under the terms of the Law Loans program.

After graduation, Debtor defaulted under the Notes, and the holder of Notes, Sallie Mae, filed a claim with HICA. On July 19, 1994, Sallie Mae assigned both Notes to HICA. On May 13, 1994, Debtor filed a petition under Chapter 7 of the Bankruptcy Code. HICA filed a proof of claim in Debtor's case for $10,536.39.

HICA and Debtor seek summary judgment on the same two issues. The first issue is whether the debt arising under the Notes falls within the exception to discharge

contained in section 523(a)(8) of the Bankruptcy Code, while the second is whether excepting the debt from Debtor's Chapter 7 discharge will impose upon her an "undue hardship" under subsection (B) of section 523(a)(8). HICA bears the burden of proof with respect to the first issue, while Debtor bears the burden of proof under the second.[2]

HICA asserts in its Motion that, as a matter of law, the debt falls within the exception of section 523(a)(8), and that Debtor cannot, as a matter of law, sustain her burden of proving "undue hardship" under subsection (B) of Section 523(a)(8). Debtor makes the contrary assertion as to both issues. She asserts that, as a matter of law, HICA has not carried its burden of proving that the debt falls within the exception of section 523(a)(8), and that she has demonstrated, as a matter of law, that excepting the debt from discharge will impose upon her an "undue hardship" as set forth in subsection (B).

CONCLUSIONS OF LAW

Bankruptcy Rule 7056 incorporates Rule 56 of the Federal Rules of Civil Procedure, which provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving

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[2] *See e.g.*, Claudine D. Palmer v. Georgia Higher Education Assistance Corp. (Matter of Claudine D. Palmer), Adv. No. 93-4180, Ch. 7 No. 92-40915, slip op. at 5-6 (Bankr. S.D.Ga. June 26, 1994).

party bears the initial burden of showing the absence of any genuine issue of material facts. Bald Mountain Bank, Ltd. v. Oliver, 863 F.2d 1560 (11th Cir. 1989). The movant should identify the relevant portions of the pleadings, depositions, answers to interrogatories, admissions, and affidavits to show the lack of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The moving party must support its motion with sufficient evidence and "demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute . . . ". United States v. Twenty (20) Cashier's Checks, 897 F.2d 1567, 1569 (11th Cir. 1990) (*quoting* Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368-69 (11th Cir. 1982)).

Once the movant has carried its burden of proof, the burden shifts to the non-moving party to demonstrate that there is sufficient evidence of a genuine issue of material fact. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991). The non-moving party must come forth with some evidence to show that a genuine issue of material fact exists. United States v. Four Parcels of Real Property, 941 F.2d at 1438. The trial court should consider "all the evidence in the light most favorable to the non-moving party." Rollins v. Tech South, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987).

Thus, the inquiry under the first issue is whether HICA has proven, as a matter of law, that the debt falls within the exception to discharge contained in section

523(a)(8), or whether Debtor has demonstrated that, as a matter of law, HICA is unable to sustain its burden of proving that the debt falls within the exception. Conversely, the inquiry under the second issue is whether Debtor has proven, as a matter of law, that excepting the debt from discharge will impose an "undue hardship" upon her, or whether HICA has demonstrated that, as a matter of law, Debtor is unable to sustain her burden of proving "undue hardship."

1. Does the Debt Fall Within § 523(a)(8)?

> Section 523(a)(8) provides:
>
> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt--
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> (8) for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or *made under any program funded in whole or in part by a governmental unit or nonprofit institution*, or for an obligation to repay funds received as an educational benefit, scholarship, or stipend . . .

11 U.S.C. § 523(a)(8) (emphasis added). There is no dispute that the loans in question were not made, insured or guaranteed by a governmental unit. The dispute centers around whether the loans are "educational loans" and whether they were made under a program funded in part by a nonprofit institution. HICA argues that the loans are educational loans and that they were made under such a program because the LawLoans program is insured in part by HEAF, which is a non-profit organization. Debtor, on the other hand, argues that

insuring is not the same as funding; the program must be funded, and not merely insured, by a nonprofit institution. She also argues that, because she did not use any portion of the loans for educational expenses, the loans do not qualify as educational loans.

Debtor's contention that the loans are not "educational loans" because she used the proceeds therefrom for activities unrelated to her legal education is without merit. The first paragraph under section XII of both promissory notes provides: "The proceeds of this loan will be used only for the educational expenses of the undersigned borrower at the law school listed above." Clearly, then, the sole purpose of the loans was to assist Debtor in defraying the costs of her legal education. Her decision to allocate the loan proceeds to other expenses, in violation of the express terms of the Notes, does not transform the loans into anything other than educational loans.[3] I find, therefore, that HICA has proven that the loans are, as a matter of law, "educational loans," as the term is used in section 523(a)(8).

As to the question of whether the loans were made under a "program funded . . . in part by . . . a non-profit institution," it is clear that the relevant scope of inquiry is the entire program through which Debtor received her loans. It is not necessary for the nonprofit organization, in this case HEAF, to have directly participated in the origination or insuring of Debtor's loan. "[T]he plain language of § 523(a)(8) indicates that it is the

[3] *See e.g.,* In re Joyner, 171 B.R. 762, 764 (Bankr. E.D.Pa. 1994); Matter of Barth, 86 B.R. 146, 148 (Bankr. W.D.Wis. 1988); In re Roberts, 149 B.R. 547, 551 (C.D.Ill. 1993); In re Vretis, 56 B.R. 156, 157 (Bankr. M.D.Fla. 1985).

program that need be funded by a nonprofit institution." In re Pilcher, 149 B.R. 595, 599-600 (9th Cir. BAP 1993).

In Pilcher, the debtor obtained a loan through a program called Law Access to help her finance her legal education. In similar fashion to the loans at issue in this case, the loan was originated by Norwest, held by Sallie Mae, and insured by HICA. HEAF participated in the program as an insurer of certain types of loans, but had not insured the loan at issue in the case. The debtor argued that her loan could not be excepted from discharge under section 523(a)(8) because the loan had not been made under a program funded in part by a nonprofit institution.

The Bankruptcy Appellate Panel for the Ninth Circuit began by observing that the plain meaning of section 523(a)(8) requires that the program, rather than the particular loan, be funded in part by a nonprofit institution. In re Pilcher, 149 B.R. at 597-98. The Court then determined that the program before it was the sort of program described in section 523(a)(8) because it received "nonprofit funding by the participation of nonprofit entities." Id. at 598. Thus, according to the Court, the fact that the debtor's loan had been insured by HICA was of no consequence; the fact that she obtained the loan from a program in which a nonprofit institution participated was sufficient to bring the program within the language of section 523(a)(8). Id. at 599-600.

The uncontradicted evidence in this proceeding is that HEAF is a nonprofit organization that insures certain loans made through the LAWLOANS program, and I conclude that HEAF's act of insuring these loans is encompassed within the concept of funding for purposes of section 523(a)(8). In economic terms, the insurer of a loan is the party whose capital is truly at risk because, in the event of default, the insurer must purchase or otherwise indemnify the party that actually makes the loan. Therefore, I find that HICA has demonstrated that, as a matter of law, the claim that it holds against Debtor falls within the exception to discharge contained in section 523(a)(8). Accordingly, HICA is entitled to summary judgment with respect to this issue.

2. "Undue Hardship"

Subsection (B) of section 523(a)(8) provides an exception to the general exception to discharge of section 523(a)(8) where:

> (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

11 U.S.C. § 523(a)(8)(B). "Whether a debtor will experience undue hardship must be

determined on a case-by-case basis after a fact specific inquiry."[4] The inquiry requires the court to take and in-depth look at a debtor's lifestyle and make a determination of whether the debtor can maintain a minimal standard of living for herself and whether there are additional circumstances present that indicate that the debtor's current state of affairs will persist for a significant portion of the student loan repayment period.[5] For this reason, the court is most reluctant, absent compelling evidence in the record, to resolve this issue on summary judgment. In this proceeding, the court does not find sufficient evidence in the record to determine the issue on either party's motions. Accordingly, the matter will be set down for trial on the issue of whether excepting the debt from discharge will impose an "undue hardship" upon Debtor.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Motion for Summary Judgment of Defendant, Hemar Insurance Corporation of America, is hereby GRANTED as to the issue of whether its claim falls within the exception to discharge contained in 11 U.S.C. Section 523(a)(8) and DENIED as to the issue of "undue hardship" under 11 U.S.C. Section 523(a)(8)(B).

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[4] Claudine D. Palmer v. Georgia Higher Education Assistance Corp. (Matter of Claudine D. Palmer), Adv. No. 93-4180, Ch. 7 No. 92-40915, slip op. at 7 (Bankr. S.D.Ga. June 26, 1994) (*citing* In re Andrews, 661 F.2d 702 (8th Cir. 1981)).

[5] Id. at 8 (*quoting* Brunner v. N.Y. State Higher Educ. Services Corp., 831 F.2d 395, 396 (2nd Cir. 1987)).

IT IS THE FURTHER ORDER OF THIS COURT that Debtor/Plaintiff"s Motion for Summary Judgment is hereby DENIED.

IT IS THE FURTHER ORDER OF THIS COURT that the Clerk assign the issue of "undue hardship" for trial on the next available calendar.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of December, 1994.